No. 650

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JOHN T. FEY, Cle

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

R. L. BRADFORD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, R. L. Bradford, respectfully prays that a writ of certiorari issue to review the final decision of the United States Court of Appeals for the Second Circuit entered November 5, 1956, rehearing denied November 29, 1956, affirming an order of the United States District Court for the Southern District of New York, denying, without opinion, petitioner's application for a writ of error *coram nobis*.

Opinion Below

The opinion of the Court of Appeals has not yet been officially reported and will be found appended to the original certified record of the proceedings filed concurrently herewith.

Grounds on Which Jurisdiction Is Invoked

The judgment sought to be reviewed was filed and entered on November 5, 1956; and a petition for a rehearing thereof was filed on November 20, 1956, and it was denied on November 29, 1956. Jurisdiction is conferred on this Court to review said judgment by writ of certiorari by Title 28, section 1254, United States Code.

Questions Presented for Review

The questions presented are:

1. Is a layman who has never been admitted to practice law in any court qualified to act as court-appointed counsel under the sixth amendment which prescribes that "in all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defense"?

2. Are proceedings on plea and judgment invalid where a court-appointed, unlicensed layman undertakes to act as counsel for a defendant in a federal court, and he fraudulently conceals such unlicensed status from the court and the defendant?

3. Is a plea of guilty procured by the fraud and coercion of a defendant's court-appointed, unlicensed layman counsel valid?

Constitutional Provisions Which the Case Involves

FIFTH AMENDMENT: "No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same

offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor to be deprived of life, liberty, or property without due process of law;* nor shall private property be taken for public use without just compensation."

SIXTH AMENDMENT: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, *and to have the assistance of counsel for his defense.*"

Statement of the Case

On October 27, 1949, an indictment was filed against petitioner in the United States District Court for the Southern District of New York purportedly charging a violation of section 1241, Title 18, United States Code.

On November 16, 1949, said district court appointed John C. Walsh counsel for petitioner.

At such time, Walsh was not, nor has he ever since been, admitted or licensed to practice law in said district, or any other federal, court; nor, so far as the record in this proceeding shows, in any state court.

That Walsh had never been admitted to practice law in any state or federal court, was wholly unknown to petitioner until 1955.

The foregoing facts concerning Walsh were alleged in petitioner's application for a writ of error *coram nobis* in said district court and were never denied by Walsh nor the Government.

On December 2, 1949, a superseding indictment (No. 131-128) was filed in said district court against petitioner.

For reasons not relevant, nor at issue, here, said indictment did not charge, nor was petitioner guilty of, any offense against the laws of the United States.

On December 6, 1949, said action proceeded to trial. After the prosecution had presented its case on the first three, of four, counts, petitioner, induced by the undenied fraud and coercion of said unlicensed Walsh, and though wholly innocent, pleaded guilty on December 7, 1949, to said indictment.

On December 12, 1949, sentence, now completely served, was pronounced.

On July 28, 1955, petitioner filed an application for a writ of error *coram nobis* in said district court on the ground that Walsh had not been admitted to practice law and that therefore petitioner was, during the proceedings on plea and judgment, without the assistance of counsel as guaranteed by the sixth amendment; and that said plea has been procured by the fraud and coercion of said unlicensed Walsh.

On September 15, 1955, said application was submitted on affidavits and briefs without hearing or oral argument. Five days later, said application was denied by said district court without opinion.

Petitioner having perfected his appeal from said order of denial, said appeal was argued before said Circuit Court of Appeals on October 1, 1956, and said order was affirmed by said court on November 5, 1956, with short opinion.

On November 20, 1956, petitioner filed a petition for rehearing in said Court of Appeals which said petition was denied on November 29, 1956, without opinion.

The following pertinent facts were alleged in the application for writ of error *coram nobis* in the district court and were not denied by the Government:

That Walsh was appointed counsel for petitioner by said district court on November 16, 1949; that Walsh was not then, nor has he ever since been, admitted to practice law in said district, nor any other federal, court; that petitioner during the time that Walsh acted as his counsel, did not know that Walsh had not been so admitted; that Walsh deliberately concealed such fact from said district court and petitioner; that Walsh deliberately practiced a gross and palpable fraud upon said court and petitioner by such concealment; that petitioner was, though innocent, induced by the fraud and coercion of Walsh to plead guilty to an indictment that charged no offense.

Paragraphs 13, 14, 15, 16, 17 and 18 of said application for writ of error *coram nobis* (Appendix, p. 1) constituted the sole record before the Court of Appeals; and so, consequently, constitutes the record here. None of the allegations contained in said paragraphs were denied by the Government and they therefore stand admitted as the facts of this proceeding.

Reasons Relied Upon for Issuance of Writ of Certiorari

The reasons relied on for issuance of the writ are as follows:

This case presents an important constitutional question which has not been, but which should be, settled by this Court, namely, whether a layman who has never been admitted to practice law, may, under the sixth amendment, act as court-appointed counsel for a defendant in a federal court.

Moreover, the decision of the Court of Appeals in this matter is in direct conflict with decisions of other Courts

of Appeal on the same subject, namely, *Mays* v. *United States,* 10 Cir., 216 F. 2d 186, holding that the appointment of an individual who had not been admitted to practice law in either state or federal courts deprived the defendant of his right to counsel under the sixth amendment; and *Chudoff* v. *McGranery,* 3 Cir., 179 F. 2d 869, holding that an attorney who had not been admitted to practice in the federal courts, could not appear for a defendant therein at proceedings on plea, even though he had been duly admitted to practice in the courts of the State of Pennsylvania.

It is, of course, contrary to elemental principles of justice that the enforcement of the constitutional right to counsel should depend solely upon the particular circuit in which a particular defendant may happen to find himself.

Moreover, the Court of Appeals in deciding this case so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision in the following particulars:

The court below ignored completely the rules of the district court relative to the legal and moral qualifications of persons entitled to practice therein. It is respectfully submitted that this Court should determine whether such rules are to be enforced or whether they are to be completely disregarded.

In *Heiskell* v. *Mosie,* C of A DC, 82 F. 2d 861, 863, the court said:

> "The rules for the admission to practice law in the Courts of the District of Columbia require the applicant to submit to an examination to test not only his knowledge and ability, but also his honesty and integrity, and the purpose behind these requirements is the protection of the public from the consequences of ignorance and venality. The same rules apply for the

same purpose, to the practice of medicine and the other learned professions. The tendency is and ought to be to strengthen rather than to weaken them."

Furthermore, other departures constitute serious denials of fundamental principles of justice, some of which are the following:

The lower court based its decision on the self-asserted fact that "Walsh had been for more than twenty years a member of the Bar of the State of New York in good standing" although there is nothing in the record whatsoever to support such a finding.

Even if such purported fact had been alleged in the affidavits, the court could not make such a finding, and base its decision thereupon, solely on affidavits, and without a hearing. This is in direct conflict with *Walker* v. *Johnston*, 312 U. S. 275, 287.

Likewise there is no evidence in the record whatsoever that Walsh's failure to be admitted in the federal court was "a mere inadvertance"; that Walsh could have been admitted upon his application therefor; that a purported letter mentioned in the opinion was ever written or mailed by petitioner; that a motion to admit Walsh for the purpose of trying the particular case would have been granted, etc.

The court below in *United States* v. *Pisciotta*, 199 F. 2d 603, remanded the cause "in order that appellant may file a supplemental affidavit to cure, if he can, the defects of his October, 1951, affidavit." The instant case presented the same allegations of coerced plea but the court below did not remand, in spite of *Walker* v. *Johnston*, 312 U. S. 275; *Waley* v. *Johnston*, 316 U. S. 101; *Herman* v. *Claudy*, 350 U. S. 116.

Thus in this Court of Appeals there is justice for Pisciotta, but none for petitioner, despite the decisions of this Court which it totally disregarded.

Coram Nobis Appropriate Remedy

Writ of error *coram nobis* is the appropriate remedy to annul proceedings rendered void by constitutional violations.

United States v. *Morgan*, 346 U. S. 502.

Argument Amplifying the Reasons Relied Upon for Allowance of the Writ

As to the First Question

Court-Appointed Counsel Had Never Been Admitted to Practice Law

Admittedly Walsh had never been licensed to practice law in the federal courts; and, so far as the record shows, he had never been admitted to practice law in any court, state, or other.

The word "counsel" as used in the sixth amendment means one duly admitted to practice law, and not just a mere layman who may be picked by the court at random from among the spectators.

Admission to practice law in the district court was then governed by the rules of said court, the pertinent parts of which are the following:

> "Any person who is a member of good standing of the Bar of the State of New York, or of the Bar of the State of New Jersey, or who has been duly admitted to the Bar of either of those states when a member in good standing for five years of the Bar of some other state or territory or possession or the District of Columbia or of a foreign country, may be admitted to practice in this Court on compliance with the following provisions:
>
> Each applicant for admission shall file at least five days prior to the hearing thereon, with the Clerk of

this Court, a written petition for admission, duly sworn to, setting forth the time when and the court where admitted and his legal training and experience at the Bar. This petition shall be accompanied by affidavits of two attorneys of this Court stating where and when affiants were admitted to practice in this Court, how long and under what circumstances such attorneys have known petitioner, and stating what affiants know of petitioner's character and experience at the Bar. Such petition shall be placed at the head of the motion calendar, and, on the call thereof, one of the attorneys whose affidavits accompany the petition shall move the admission of the petitioner, and if admitted, the petitioner's oath of office shall be taken in open Court.

Any member of good standing of the Bar of any state or of any United States District Court may upon motion be admitted to argue or to try any cause in whole or in part as counsel or advocate. Only an attorney or proctor of this Court may enter appearances for the parties, sign stipulations or receive payment upon judgments, decrees or orders."

These rules prescribe certain conditions precedent that must be complied with before any person can lawfully practice in the district court.

When thus admitted, the order of admission becomes the *judgment of the court.*

As this Court said in *Ex parte Garland*, 4 Wall, 333, 378:

"They (attorneys) are officers of the court, admitted as such by its order, upon evidence of their possessing sufficient legal learning and fair private character * * * The order of admission is the judgment of the court that the parties possess the requisite qualifications as attorneys and counsellors, and are entitled to appear as such and conduct cases."

Admittedly, Walsh was never an officer of the district court. He never, as required by its rules, filed the requisite petition; he was never sponsored by two attorneys; his legal learning and fair private character were never adjudged; he never took the *oath of office;* and he never signed the roll of attorneys.

In other words, Walsh was an imposter. He could never legally represent any party because he had never been adjudged qualified by the district court to do so; *and he never took the oath of office.*

Unlicensed counsel cannot participate in a defendant's plea in a federal court even though he may be admitted to practice in the state courts.

In *Chudoff* v. *McGranery,* 3 Cir., 179 F. 2d 869, 872, the court said:

> "It appears that on May 9, 1949, Judge McGranery refused to permit Turner to enter a plea of not guilty because he was represented by Mr. Chudoff. But on that date Mr. Chudoff was not entitled to appear on behalf of a client in the United States District Court for the Eastern District of Pennsylvania, since he was not then a member of the bar of that court and entitled to practice law therein * * * The admission of an attorney to practice at the bar of a court, while a formal matter, is nontheless prerequisite of practice before that Bar."

In *Mays* v. *United States,* 10 Cir., 216 F. 2d 186, the court held that the appointment of unlicensed counsel deprived the defendant of the right to the assistance of counsel as guaranteed by the sixth amendment.

Mays alleged that his "counsel" had never been admitted to either state or federal courts. That is the situation here, for Walsh was, admittedly, never admitted to any federal court, and there is no evidence in the record that he was ever admitted to any state court.

Where there is no hearing, the allegations of the application must be taken as true. *Williams* v. *Kansas,* 323 U. S. 471, 474; *Hawk* v. *Olson,* 326 U. S. 271, 273.

The Court of Appeals admits that Walsh had never been admitted to practice law in any federal court. It is also admitted that Walsh fraudulently concealed such fact from the district court and petitioner.

If Walsh had not been admitted to practice in the courts of the State of New York, he was practicing law in any court without a state license, and he thereby committed the criminal offense denounced by sections 270, 271, 272, N. Y. Penal Law.

If Walsh had been admitted to practice in the state courts, then by his fraudulent concealment of his unlicensed federal status, he deceived both the court and petitioner as to a material fact, and he thereby committed the criminal offense denounced by section 273, N. Y. Penal Law, which prescribes that:

> "Any attorney or counselor, who: (1) is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party * * * is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by this Chapter, he forfeits to the party injured treble damages to be recovered in a civil action."

In any event, the court appointed an admitted malefactor to represent a then unconvicted defendant. Surely, under the sixth amendment, a defendant in a federal court deserves better counsel than that.

The Opinion of the Court Below

The Court of Appeals entered an opinion (page 3 of Record) which avoided the issue. It affirmed the order of the district court, rendered without opinion, because it

found that Walsh was "competent", though Walsh's competency was never at issue in the proceeding; and, moreover, there was nothing in the record whatsoever concerning the competency of Walsh upon which the court could make such a determination.

The court below stated that Walsh "had been for more than twenty years a member of the Bar of the State of New York, in good standing." There is not a word in the entire record upon which the court could have based such a finding; and in view of *Chudoff* v. *McGranery, supra,* it is irrelevant anyway.

The Court of Appeals stated that Walsh merely "failed to make formal application for admission to practice before the United States District Court for the Southern District of New York, or for leave to try appellant's case."

This can be said of any person who practices law in any court without first having been admitted.

Moreover, there is nothing in the record whatsoever showing that Walsh could have been admitted; or that Walsh had any of the qualifications, moral or legal, that would have entitled him thereto. In fact, the record shows to the contrary, for the admitted violator of New York's Penal Laws was not fit, legally or morally, to practice law in any court.

Apparently, the Court of Appeals takes the view that court rules relating to admission are mere obsolete technicalities that should be disregarded notwithstanding that persons who practice without admission are in contempt of court (*Heiskell* v. *Mosie,* 82 F. 2d 861, 863); that proceedings conducted by them are void (7 CJS section 16, page 725; *People* v. *James,* 150 Misc. (N. Y.) 390; *Colton* v. *Oshrin,* 155 Misc. (N. Y.) 383); and that under the laws of the State of New York, such conduct is a criminal offense (sections 270, 271, Penal Law).

The court below stated that Walsh's failure to seek admission "does not justify any inference that counsel was not in every way competent to represent appellant * * *."

This can be said of any layman who practices law without a license. Competency is no defense to a criminal prosecution for practicing law without a license; and, moreover, competency was never at issue here.

The lower court stated "that had either counsel or the trial judge been aware of the omission, a motion to admit counsel for the purpose of trying the particular case would have been promptly granted." However, no motion was made, and what the trial court and petitioner would have done upon such a motion, is pure conjecture and not the basis for a judicial finding of fact.

So far as the record shows, Walsh had never been admitted to practice in any state or federal court, and therefore could not have been admitted for the purpose of trying the particular case.

Walsh was certainly aware of his unlicensed status, and the trial judge should have been.

In any event, since Walsh had never been admitted to any federal court, he could not have filed a notice of appearance for petitioner because, as the rules state, "only an attorney or proctor of this Court may enter appearances for parties."

Certainly the sixth amendment means counsel who can file a notice of appearance.

The Court of Appeals overlooked that fact that petitioner should have something to say about who is to be his counsel. If the court is going to appoint a layman the defendant should be so advised, so he may register his formal objection. It is doubtful if any defendant, and certainly not this petitioner, would, knowingly, accept as counsel an unlicensed layman merely drawn at random from a court room audience.

The lower court stated that if Walsh had been of petitioner's own choosing the district court could have compelled Walsh to serve. Walsh was not of petitioner's own choosing, and the court could not have compelled Walsh to serve because Walsh was an unlicensed layman.

The lower court makes much ado about Judge Weinfeld's decision, 122 F. Supp. 915. The court admits in its opinion that petitioner did not know of Walsh's status as an unlicensed layman until after this decision, so what possible bearing could it have on the issue here?

From the foregoing it is evident that the Court of Appeals made no effort to determine the constitutional question involved. It drifted off into Walsh's "competency" which was not at issue.

And even on the irrelevant issue of "competency", it did not base its finding on any fact of record.

Morever, since the lower court did not decide the question as to whether the appointment of a layman satisfies the counsel clause of the sixth amendment, petitioner, thus far, has been denied the right to appellate review, which can now be obtained only through the intervention of this Court.

As to the Second Question

Walsh Practiced a Gross and Palpable Fraud Upon the District Court and Appellant

Walsh was morally and legally bound to inform the District Court that he could not accept the appointment because he was a layman not licensed to practice law. He was likewise morally and legally bound to advise appellant of the same fact. Obviously, no defendant would knowingly accept, as counsel, a man who had never been admitted to practice law.

The unlicensed Walsh by concealing the fact that he had never been admitted to practice law perpetrated a gross and palpable fraud upon the district court and appellant.

Such fraud vitiated all the proceedings in which Walsh participated, including plea and judgment.

Where a judgment has been procured by fraud upon the court, it violates the due process clause, and is void.

A federal court has inherent power and it is its duty to vacate a judgment so procured.

> *Hazel-Atlas* v. *Hartford Empire Co.*, 322 U. S. 238, 244-248;
> *Universal Oil Co.* v. *Root Mfg. Co.*, 328 U. S. 575, 580;
> *United States* v. *Smith*, 331 U. S. 469, 476;
> *Chessman* v. *Teets*, 350 U. S. 3;
> *Chessman* v. *Teets*, 9 Cir., 221 F. 2d 276.

In such cases, lapse of time or the diligence of the litigants is immaterial since such tampering with the administration of justice is a wrong against the institutons set up to protect the public (*Hazel-Atlas, supra*, p. 246).

As to Third Question

Plea Was Procured by the Fraud and Coercion of the Unlicensed Counsel Walsh

Paragraph 14 of petitioner's application for a writ of error *coram nobis* in the district court alleged:

> "That notwithstanding that said second indictment charged no offense against the laws of the United States, and notwithstanding that no offense was or could have been committed by petitioner upon any

> state of facts here existing, petitioner was nevertheless induced by fraud and coercion by said Walsh to enter a plea of guilty."

This allegation was never denied by the Government, and it therefore stands admitted.

The Court of Appeals, however, stated in its opinion that petitioner's allegation of fraud and coercion "is purely conclusionary," citing *United States* v. *Pisciotta*, 2 Cir., 199 F. 2d 603. Yet in that case, where the allegations were identical, the court said that *Pisciotta* "was induced to plead by fraud or coercion practiced upon him by his attorney or his brother. Obviously such issues cannot be determined solely by the files and records of the sentencing court; they will necessarily depend in a large part upon the convict's own testimony. . . . Consequently, we think the cause should be remanded in order that appellant may file a supplemental affidavit to cure, if he can, the defects of his October, 1951, affidavit" (pp. 606, 607).

Thus, this Court of Appeals does not only not follow the decisions of other Circuits, nor the decisions of this Court, but it does not even follow its own. The court below did not remand here, and so, in this Circuit, there is justice for Pisciotta, but none for petitioner, although, upon the facts, the cases are identical.

And the court below heeded not the decisions of this Court on the same facts.

In *Herman* v. *Claudy*, 350 U. S. 116, it was alleged generally that the plea was the result of coercion and threats. This Court said:

> "He alleged: (1) that his pleas of guilty were the result of coercion and threats by state officers."
>
> Our prior decisions have established that: (1) a conviction following a trial or on a plea of guilty based

> on a confession extorted by violence or by mental coercion is invalid under the Federal Due Process Clause." (p. 118)

Upon such allegations, this Court held that the application should not have been summarily dismissed, and that *Herman* was entitled to a hearing.

The present case is even more substantial for in the *Herman* case the allegation of coercion was denied, while here it is admitted.

In *Waley* v. *Johnston,* 316 U. S. 101, similar general allegations of coercion were made. The return, as here, "made no denial of the allegations of coercion" (p. 103). The case was remanded for a hearing.

In *Walker* v. *Johnston,* 312 U. S. 275, 285, where the plea was alleged to have been coerced, the Court said:

> "Thus the case was disposed of on *ex parte* affidavits and without the taking of testimony."
>
> "Not by the pleadings and the affidavits, but by the whole of the testimony, must it be determined whether the petitioner has carried his burden of proof and shown his right to a discharge." (p. 287)

Here, without a hearing the lower court undertook to decide this whole matter entirely on affidavits, and on conjectures not of record.

The opinion states that "the same claim appears to have been urged before Judge Weinfeld on the prior motion, but was dropped when the Government offered in evidence a letter written by appellant, after sentence, thanking the prosecutor for his 'moderate recommendation' in connection with the sentence imposed."

Such statement is utterly without any foundation in fact as appears from the record submitted herewith.

The record of the proceedings before Judge Weinfeld was not part of the record either before the district court in this matter, or before the Court of Appeals; no such coerced plea was ever urged before Judge Weinfeld; it was not dropped because never made; there was no such letter, if it exists, in the record before Judge Weinfeld, or the Court of Appeals; and the quoted portion of the letter does not contradict Walsh's admitted fraud and coercion. Moreover, it was written about a different subject matter to a different person; and a *coram nobis* proceeding is not *res adjudicata* on a different issue. *Waley* v. *Johnston,* 316 U. S. 101, 105.

From the foregoing, it is clear that the action of the Court of Appeals on the coerced and fraudulent plea was entirely arbitrary; was based on matters not of record; was founded solely on affidavits; was contrary to its own decisions; was in conflict with decisions of this Court and other Courts of Appeal; and was and is contrary to the mandates of the constitution and elemental principles of justice.

Summary of Argument

The court-appointed Walsh was, as is conceded, never admitted to practice law in any federal court; and, so far as the record shows, was merely a layman never admitted to practice law in any court.

The appointment by a court of an unlicensed layman to represent a defendant in a federal court does not provide the counsel which the sixth amendment prescribes.

Admittedly, Walsh never advised the district court, nor petitioner, that he was merely an unlicensed layman and had never been admitted to practice law. This deception constituted a gross and palpable fraud upon the court and

petitioner, violated the due process clause, and so invalidated all of the proceedings in which Walsh so illegally and fraudulently participated.

It is conceded that the purported guilty plea was procured by the fraud and coercion of the unlicensed Walsh in violation of due process, and yet no hearing on these uncontradicted facts was granted by either lower court, notwithstanding the explicit mandate of this Court to the contrary.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should in all respects be granted.

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APPENDIX

Opinion by Court Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 7—October Term, 1956.

(Argued October 1, 1956 Decided November 5, 1956.)

Docket No. 23826

UNITED STATES OF AMERICA,

Appellee,

—against—

ROBERT BRADFORD,

Appellant.

Before:

FRANK, MEDINA and HINCKS,

Circuit Judges.

Defendant appeals from an order of the United States District Court for the Southern District of New York, denying his petition for a writ of error *coram nobis*. Sylvester J. Ryan, *Judge*. Affirmed.

PAUL W. WILLIAMS, United States Attorney for the Southern District of New York, New York City (Whitney North Seymour, Jr. and Maurice N. Nessen, New York City, of counsel), *for appellee.*

E. F. W. WILDERMUTH, Jamaica, New York, *for appellant.*

MEDINA, *Circuit Judge*:

On December 12, 1949, appellant was convicted of the crime of using the mails in a scheme to defraud (18 U. S. C. Section 1341). He has served his sentence and is no longer subject to parole or probation. In reliance upon the ruling of the Supreme Court in *United States* v. *Morgan*, 346 U. S. 502, however, appellant claims the judgment of conviction is void, and he has attacked it on various grounds, most of which were disposed of when Judge Weinfeld dismissed appellant's first application for a writ of error *coram nobis* on November 23, 1953, as "entirely lacking in merit or substance." *United States* v. *Bradford*, 122 F. Supp. 915. The appeal from Judge Weinfeld's order was dismissed for lack of prosecution on October 20, 1955.

Since then appellant discovered that the attorney assigned by the Court to defend him, who had been for more than twenty years a member of the Bar of the State of New York, in good standing, had failed to make formal application for admission to practice before the United States District Court for the Southern District of New York or for leave to try appellant's case as his counsel.

The sole question before us on this appeal is whether the fact that appellant was represented at his trial by a lawyer who had failed to comply with Rule III of the General Rules of the District Court for the Southern District of New York relative to the admission of members of the Bar to practice before that court[1] makes appellant's conviction void as violative of his rights under the Sixth Amendment to the Constitution of the United States, which provides: "In all criminal prosecutions, the accused shall

[1] Rule III, in effect October 28, 1943 through February 29, 1952 provided:

"Any person who is a member in good standing of the Bar of the State of New York, or of the Bar of the State of New Jersey, or who has been duly admitted to the Bar of either of those states when a member in good standing for five years of the Bar of some other state or territory or possession or the District of Columbia or of a foreign country, may be admitted to practice in this Court on compliance with the following provisions:

enjoy the right * * * to have the assistance of counsel for his defense." Judge Ryan denied the petition for a writ of error *coram nobis*, without opinion.

We think appellant's point is wholly without merit. The failure to comply with Rule III was a mere inadvertence, which in no way caused any infringement of appellant's constitutional rights; nor does it justify any inference that counsel was not in every way competent to represent appellant and do whatever was required of him as defense counsel. Indeed, Judge Weinfeld has already found: "At each and every stage of all proceedings had with respect to the aforesaid indictments, the defendant at all times had the advice and assistance of competent counsel and was duly and properly represented." *United States* v. *Bradford, supra*, at p. 920.

We have no doubt that, had either counsel or the trial judge been aware of the omission, a motion to admit counsel for the purpose of trying the particular case would have been promptly granted. It is inconceivable that the failure to take this purely formal step caused any prejudice to appellant. See *United States* v. *Wight*, 2 Cir., 176 F. 2d 376, 378, cert. denied, 338 U. S. 950. Moreover, had counsel been of appellant's own choosing, in the absence of some

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"Each applicant for admission shall file at least five days prior to the hearing thereon, with the Clerk of this Court, a written petition for admission, duly sworn to, setting forth the time when and court where admitted and his legal training and experience at the Bar. This petition shall be accompanied by affidavits of two attorneys of this Court stating where and when affiants were admitted to practice in this Court, how long and under what circumstances such attorneys have known petitioner, and stating what affiants know of petitioner's character and experience at the Bar. Such petition shall be placed at the head of the Motion calendar, and, on the call thereof, one of the attorneys whose affidavits accompany the petition shall move the admission of the petitioner, and if admitted, the petitioner's oath of office shall be taken in open Court.

"Any member in good standing of the Bar of any state or of any United States District Court may upon motion be admitted to argue or to try any cause in whole or in part as counsel or advocate. Only an attorney or proctor of this Court may enter appearances for parties, signed stipulations or receive payment upon judgments, decrees or orders."

Rule 3, now in force, was promulgated on March 1, 1952, and differs in many respects from that quoted above.

showing that he lacked the qualifications necessary for the performance of his duties as defense counsel, it would seem that the trial judge, at least in a criminal case, would have been required to permit him to proceed, despite the fact that counsel had not been admitted to practice in the District. *United States* v. *Bergamo,* 3 Cir., 154 F. 2d 31.

Nothing to the contrary was held by the Tenth Circuit in *Mays* v. *United States,* 10 Cir. 216 F. 2d 186, where the claim that the judgment of conviction was void, for violation of rights under the Sixth Amendment, was rejected below without a hearing, despite the fact that there was an allegation that counsel for petitioner had not been admitted to practice in either the state or federal courts in Kansas, where the case was disposed of. The allegation relative to the status of counsel at least raised an inference of incompetency, and *Mays* merely stands for the proposition that, on the inadequate record there before the court, the petition should not have been summarily disposed of without a hearing.

The allegation here that after the trial had proceeded for a time "appellant was induced by the fraud and coercion" of his said counsel to plead guilty, is purely conclusionary and on that account insufficient to support the application. *United States* v. *Pisciotta,* 2 Cir., 199 F. 2d 603. Furthermore, the same claim seems to have been urged before Judge Weinfeld on the prior motion but was dropped when the government offered in evidence a letter written by appellant, after sentence, thanking the prosecutor for his "moderate recommendation," in connection with the sentence imposed.

Affirmed.

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CITATIONS

Cases:

Chudoff v. *McGranery*, 179 F. 2d 869 5

Mays v. *United States*, 216 F. 2d 186 5

Rule involved:

General Rules of the District Court for the Southern District of New York, Rule III 2, 4, 5

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 650

R. L. BRADFORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 3–7) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 5, 1956 (R. 8) and a petition for rehearing (R. 10–13) was denied on November 29, 1956 (R. 14, 16). The petition for a writ of certiorari was filed on December 26, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether failure of court-appointed counsel, a member in good standing of the New York state bar for

twenty years, to be admitted to practice before the District Court for the Southern District of New York, when he represented petitioner at a federal trial, constituted fraud and a denial of petitioner's right to counsel under the Sixth Amendment.

RULE INVOLVED

Rule III, General Rules of the District Court for the Southern District of New York, provided as follows:[1]

> Any person who is a member in good standing of the Bar of the State of New York, or of the Bar of the State of New Jersey, or who has been duly admitted to the Bar of either of those states when a member in good standing for five years of the Bar of some other state or territory or possession or the District of Columbia or of a foreign country, may be admitted to practice in this Court on compliance with the following provisions:
>
> Each applicant for admission shall file at least five days prior to the hearing thereon, with the Clerk of this Court, a written petition for admission, duly sworn to, setting forth the time when and court where admitted and his legal training and experience at the Bar. This petition shall be accompanied by affidavits of two attorneys of this Court stating where and when affiants were admitted to practice in this Court, how long and under what circumstances such attorneys have known petitioner, and stating what affiants know of petitioner's character and experience at the Bar. Such petition shall

[1] This rule, which was promulgated in October, 1943, was changed on March 1, 1952.

be placed at the head of the Motion calendar, and, on the call thereof, one of the attorneys whose affidavits accompany the petition shall move the admission of the petitioner, and if admitted, the petitioner's oath of office shall be taken in open Court.

Any member in good standing of the Bar of any state or of any United States District Court may upon motion be admitted to argue or to try any cause in whole or in part as counsel or advocate. Only an attorney or proctor of this Court may enter appearances for parties, sign stipulations or receive payment upon judgments, decrees or orders.

STATEMENT

During trial, in December 1949, in the United States District Court for the Southern District of New York petitioner pleaded guilty to four counts charging mail fraud violations. He was sentenced to concurrent terms of imprisonment of one year and one day on counts 1 and 2 and to three years probation on counts 3 and 4 to commence upon the expiration of his term of imprisonment (R. 1–2). Petitioner's appeal from the conviction was dismissed as frivolous. He has served his sentences.

During the proceeding, petitioner was represented by court-appointed counsel, John C. Walsh (R. 1), who had been a member in good standing of the New York state bar for 21 years. Mr. Walsh, however, had not been admitted to practice before the District Court for the Southern District of New York at that time (R. 2).

In a *coram nobis* proceeding initiated July 28, 1955, petitioner asserted that Mr. Walsh's failure to be admitted to practice before the Southern District Court of New York constituted fraud and a denial of petitioner's right to counsel under the Sixth Amendment. The District Court denied the motion without a hearing (R. 1). On appeal, the judgment was affirmed (R. 8).

A prior *coram nobis* application by petitioner had gone to hearing, 122 F. Supp. 915, and an appeal from the order denying the application had been dismissed for want of prosecution. Although the particular point of counsel's failure to be admitted in the federal court was not raised, the opinion of the District Court in that prior proceeding noted that petitioner's charge that his plea of guilty had been induced by promises of his court-appointed counsel was withdrawn when the court was about to admit in evidence a letter petitioner had written to the United States Attorney thanking him for his moderate recommendation on sentencing. 122 F. Supp. at p. 920.

ARGUMENT

Adopting throughout his petition the false premise that attorney Walsh was merely a layman with no right whatever to practice law, petitioner argues that his plea was induced by fraud and resulted from the denial of his right to assistance of counsel. However, as the court below correctly observed, "The failure to comply with Rule III was a mere inadvertence, which in no way caused any infringement of [petitioner's] constitutional rights" (R. 5). As a matter of

fact, Mr. Walsh had been a member in good standing of the bar of the State of New York for more than 20 years. Under Rule III, "Any member in good standing of the Bar of any state or of any United States District Court may upon motion be admitted to argue or try any cause in whole or in part as counsel or advocate". Hence, Mr. Walsh would, on application, have been admitted as a matter of course. The court's assignment of Mr. Walsh may even be considered as constituting the admission of Mr. Walsh to the bar of the District Court for the purpose of representing petitioner. No claim is made that Mr. Walsh was incompetent; petitioner virtually concedes his competency, cavalierly dismissing that factor as "irrelevant" (Pet. 12, 14).[2]

It is not clear that petitioner's allegation, in his present *coram nobis* petition, that his plea of guilty was induced by fraud of counsel (see Pet. 15–18) was, in the context of the entire petition (see R. 1–2), intended to allege more than that the fraud and coercion resulted from the fact of Walsh's non-admission to the District Court bar. In any event, the District

[2] Cases cited by petitioner (Pet. 10) are inapposite under the factual situation in the instant case. In *Chudoff* v. *McGranery*, 179 F. 2d 869 (C. A. 3), there was no question as to validity of the plea of guilty, since it was entered after Congressman Chudoff, advised of the fact that he was not a member of the federal district court, had then been admitted on motion. In *Mays* v. *United States*, 216 F. 2d 186 (C. A. 10), the allegation that counsel had not been admitted to practice in either the state or federal courts in Kansas (as contrasted with the instant case where Mr. Walsh was admited in New York and thus eligible for federal admission) was suggestive of counsel's incompetency. The court held that the accused was at least entitled to a hearing on the issue, instead of having his motion to vacate sentence summarily dismissed.

Court was not required to hold a hearing on that allegation in view of the history of the same charge in the prior proceeding. See the Statement, *supra*, p. 4.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1957.

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